IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1966

No. 1040

QUINAULT TRIBE OF INDIANS, *Petitioner*,

v.

A. M. GALLAGHER, Sheriff of Grays Harbor County, State of Washington; JOHN J. O'CONNELL, Attorney General of the State of Washington; ALBERT D. ROSELLINI, Governor of the State of Washington, *Respondents*.

REPLY OF RESPONDENTS TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOHN J. O'CONNELL,
Attorney General,

JANE DOWDLE SMITH,
Assistant Attorney General,

L. EDWARD BROWN,
Prosecuting Attorney for Grays Harbor County,
P. O. Box 938,
Montesano, Washington,

Attorneys for Respondents.

Office and Post Office Address: Temple of Justice, Olympia, Wa. 98501

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Attorney General,

JANE DOWDLE SMITH,
Assistant Attorney General,

L. EDWARD BROWN,
Prosecuting Attorney for Grays Harbor County,
P. O. Box 529,
Montesano, Washington

Attorneys for Respondents.

Office and Post Office Address: Temple of Justice, Olympia, Wn. 98501

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Respondents, A. M. Gallagher, Sheriff of Grays Harbor County, State of Washington; and John J. O'Connell, Attorney General of the State of Washington; and Albert D. Rosellini, Governor of the State of Washington, hereby waive any objections to the issuance of a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above entitled case November 10, 1966.

OPINIONS

The opinion of the District Court for Western Washington of December 7, 1965 delivered orally from the bench.

The first opinion of the Ninth Circuit Court of Appeals rendered September 19, 1966 affirming the District Court on jurisdictional grounds (368 F.2d 648).

The second opinion of the Ninth Circuit Court of Appeals rendered on November 10, 1966 on a petition for rehearing which upheld the right of the state of Washington to assume jurisdiction over Indians (368 F.2d 655).

JURISDICTION

Jurisdiction of this court is invoked by the Petitioner for a writ of certiorari under 28 U.S.C. § 1254(1) from the decision of the Ninth Circuit Court of Appeals dated November 10, 1966.

QUESTIONS PRESENTED

1. Whether the provisions of Public Law 280 required the state of Washington to amend its constitution prior to assuming any jurisdiction over Indian tribes and reservations within the state.

2. Whether Public Law 280 authorized the state of Washington to assume criminal and civil jurisdiction over Indian tribes and reservations in the manner prescribed by the legislative enactment of 1963 (chapter 37.12 RCW).

STATUTES INVOLVED

Public Law 280 (67 Stat. 488, 18 U.S.C. § 1162, 28 U.S.C. § 1360).

Revised Code of Washington (RCW) 37.12.010, 37.12.021.

STATEMENT OF THE CASE

In 1953, Congress enacted Public Law 280 (67 Stat. 488, 18 U.S.C. § 1162, 28 U.S.C. § 1360) which gave civil and criminal jurisdiction over Indian lands to the states of California, Minnesota, Nebraska, Oregon and Wisconsin. In addition to conferring jurisdiction over Indians to the five specific states, Sections 6 and 7 of the act authorized other states to assume jurisdiction either by an amendment of their state constitution or by enactment of legislation assuming jurisdiction.

In 1957, the state of Washington enacted chapter 37.12 RCW whereby the state agreed to assume civil and criminal jurisdiction over Indian tribes within the state upon the presentation of a resolution from the majority of any tribal council or other governing body of a tribe requesting the governor to issue a proclamation that the state would assume such jurisdiction.

Subsequent to that time, the Supreme Court of the state of Washington decided the case of *State v. Paul*, 53 Wn.2d 789, 337 P.2d 33 (1959) pages 13-20 (Appendix A). In that case, it was alleged that chapter 37.12 RCW was unconstitutional and invalid be-

cause the state had not amended Article XXVI of the constitution which was a part of the Enabling Act (25 Stat. 676, 677 (1889)) before assuming jurisdiction over Indians pursuant to Public Law 280. Article XXVI provides in part as follows:

> "That the people inhabiting this state do agree and declare that they forever disclaim all right and title * * * to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States * * * "

The Enabling Act whereby Washington was admitted to the Union also included the states of North Dakota, South Dakota and Montana. In the *Paul* case, *supra*, the Washington Supreme Court held that it was unnecessary to amend Article XXVI of the constitution in order for the state to assume civil and criminal jurisdiction over Indians, but held that such jurisdiction could be assumed pursuant to Public Law 280 by an enactment of the state legislature. Accordingly, it upheld the constitutionality of chapter 37.12 RCW as enacted in 1957.

In 1963, the legislature of the state of Washington amended the 1957 act and assumed jurisdiction over all Indians and Indian tribes within the state in certain specified areas, but still authorized the assumption of full civil and criminal jurisdiction over

any tribe pursuant to the request of the tribe as previously authorized by the 1957 act, RCW 37.12-.010 and 37.12.021, pages 21, 22 (Appendix B).

The Quinault Indian Reservation first came under state jurisdiction by virtue of a proclamation of the governor on May 5, 1958 at the request of the Quinault Business Committee. The validity of the proclamation was challenged by the Quinaults but was upheld by the Supreme Court of the state of Washington in the case of *State v. Bertrand*, 61 Wn.2d 333, 378 P.2d 427 (1963). Nevertheless, on January 12, 1965 the governor withdrew his 1958 proclamation, and accordingly, the Quinault Reservation is under state jurisdiction pursuant to the provisions of the 1963 act.

REASONS FOR GRANTING THE WRIT

1. The respondents agree with the appellants herein that an important issue of state-federal Indian relations is raised in the instant case which is of great importance to all of the Indian tribes in the state of Washington as well as those in other states. However, the question of whether the state of Washington was required to amend its constitution in order to assume jurisdiction pursuant to Public Law 280 over Indians within the state of Washington is a state question which has been decided by the Supreme Court of the state of Washington in *State v. Paul, supra.* This court has held in many cases that it is the duty of the federal courts to follow state court decisions on questions involving the construction and

application of state statutes and state constitutions, and they are bound by the decisions of the highest courts of the state in matters depending upon the construction of state statutes or constitutions. 28 U.S.C. § 1652; *Cohen v. Beneficial Industrial Loan Corporation*, 337 U.S. 541, 69 S.Ct. 121, 93 L.Ed. 1528 (1948); *Aero Mayflower Transit Co. v. Board of Railroad Commissioners*, 332 U.S. 495, 68 S.Ct. 167, 92 L.Ed. 99 (1947); *Louisiana v. Resweber*, 329 U.S. 459, 67 S.Ct. 374, 91 L.Ed. 422 (1946); *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). See also *Anderson v. Gladden*, 188 F.Supp. 666, 676 (D.C. Ore. 1960) aff. 293 F.2d 463 (9th Cir. 1961).

2. The decision of the Ninth Circuit Court of Appeals held that the provisions of Public Law 280 authorized the state of Washington to assume jurisdiction over Indian tribes and reservations as was done by the 1963 amendment to chapter 37.12 RCW. Petitioners allege that the decision of the Ninth Circuit Court of Appeals is in error, inasmuch as it is in conflict with the decision of the Supreme Court of South Dakota in the case of *Re Julia Hankins*, 80 S.D. 435, 125 N.W.2d 89 (1964). In that case, the Supreme Court of South Dakota was concerned with the validity of legislation enacted pursuant to Public Law 280 wherein the state assumed jurisdiction over the operation of motor vehicles upon highways located in Indian country. The South Dakota court held that so-called "piecemeal" assumption was not authorized by Public Law 280.

Respondents do not agree with petitioner's argument that the Ninth Circuit Court of Appeals is bound by the decision of a state court interpreting a federal statute. The interpretation of Public Law 280 as enacted by Congress is a matter for the federal courts and the decision of the Supreme Court of South Dakota is of no effect insofar as the Ninth Circuit Court of Appeals is concerned, nor upon any federal court. In the decision of the Circuit Court of November 10, 1966 the court stated as follows with regard to the 1963 legislation enacted by the state of Washington:

> "The third claim which plaintiffs purport to state in their complaint is that chapter 36, Laws of 1963, amending chapter 240, Laws of 1957, is void because it represents only a partial assumption of state jurisdiction over Indian reservations, whereas Public Law 280 does not authorize partial assumption of jurisdiction.
>
> "The scope of chapter 36 is summarized in our earlier opinion, opposite note 2. *We do not read that act as constituting only a partial assumption of jurisdiction. The state therein indicates its willingness to extend criminal and civil jurisdiction over all Indians and Indian territory, reservations, country and lands within the state, it being provided, however, that as to some matters concerning some Indians, there must first be a tribal resolution and a gubernatorial proclamation.* In chapter 240, Laws of 1957, this Indian resolution and governor's proclamation procedure applied to all exertions of state jurisdiction. [Emphasis supplied]

"In our opinion, the indicated condition precedent to the exertion of state jurisdiction as to some matters concerning some Indians involves no violation of Public Law 280."

CONCLUSION

Respondents concur with petitioner that inasmuch as the question of assumption of jurisdiction by the various states pursuant to Sections 6 and 7 of Public Law 280 is of vital importance to Indian tribes as well as to state and county governments throughout the country, the petition for writ of certiorari should be granted.

Respectfully submitted,

JOHN J. O'CONNELL,
Attorney General,

JANE DOWDLE SMITH,
Assistant Attorney General,

L. EDWARD BROWN,
Prosecuting Attorney for Grays Harbor County,
P. O. Box 529,
Montesano, Washington

Attorneys for Respondents.

APPENDIX A

THE STATE OF WASHINGTON, *Plaintiff and Relator*, v. JANICE PAUL, *Defendant*,
THE SUPERIOR COURT FOR SNOHOMISH COUNTY, *Charles R. Denney, Judge*, *Respondent*.
No. 35005

[1] STATES—CONSTITUTIONAL LAW—ENABLING ACT—MODIFICATION—POWER OF LEGISLATURE. Const. Art. XXVI, providing that the enabling act of the state of Washington shall be irrevocable without the consent of the people of the state, may be complied with by the people of the state speaking through the Legislature, and does not require an amendment of the constitution by vote of the people.

[2] INDIANS—CRIMINAL PROSECUTIONS—JURISDICTION—STATE COURTS. Laws of 1957, chapter 240, establishing a procedure by which the state could assume civil and criminal jurisdiction over Indian tribes within the state, is not violative of Const. Art. XXVI, which adopts the Washington Enabling Act (25 Stat. 676) and provides that it "shall be irrevocable without the consent of the United States and the people of Washington," and that "Indian lands shall remain under the absolute jurisdiction and control of the Congress", since the Legislature in enacting Laws of 1957, chapter 240, spoke for the people and supplemented an act of Congress (67 Stat. 588) authorizing the states to assume jurisdiction of Indians; hence, a Superior Court had jurisdiction over a member of an Indian tribe and resident of a reservation charged with second-degree assault upon the person of another Indian allegedly committed on a reservation, where the tribe to which the defendant belonged had complied with the procedure provided in Laws of 1957, chapter 240, and the Governor had proclaimed state jurisdiction over the tribe.

Certiorari to review an order of the superior court for Snohomish county, No. 2093, Denney, J., entered December 10, 1958, dismissing a prosecution for second-degree assault. Reversed.

Arnold R. Zempel, R. C. Jefferson, The Attorney General, Mitchell Doumit and *E. P. Donnelly, Assistants*, for relator.

Newell Smith, for respondent.

Charles P. Moriarty, Richard F. Broz, Raymond C. Coulter, and *Leon Jourolmon, amici curiae.*

FINLEY, J.—Janice Paul, an Indian, is a member of the Skagit tribe and resides on the Tulalip Indian reservation in Snohomish county. She is subject by treaty to the jurisdiction of the Tulalip Indian Corporation.

By information, Janice Paul was charged with the crime of second degree assault. The acts which are alleged to have constituted the assault occurred on the Tulalip reservation, and the person alleged to have been assaulted is an Indian.

A motion for dismissal of the action was filed after the arraignment of Janice Paul. It urged that the superior court for Snohomish county had no jurisdiction of the person of the defendant or the subject matter of the action. In disposing of the matter, the trial judge ordered the cause dismissed, with prejudice, on the ground of lack of jurisdiction, holding chapter 240, Laws of 1957, p. 941, to be unconstitutional. This created an emergent situation respecting law enforcement, peace and order in certain localities adjacent to or embracing Indian reservations in the state of Washington. Consequently, this court granted the state's petition for certiorari.

The constitutionality of chapter 240, *supra*, should be considered in the light of several constitutional provisions and in relation to certain legislative enactments leading up to the passage of chapter 240, *supra*.

It was in 1889 that the Congress of the United States admitted the states of Washington, North Dakota, South Dakota and Montana into the Union; 25 Stat. 676. The enabling act provided, *inter alia*, for a constitutional convention in the state of Washington. It further provided:

> "* * * And said conventions shall provide, by ordinances irrevocable without the consent of the United States and the *people of said States*:
>
> "* * *
>
> "Second. That the people inhabiting said proposed States do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries hereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, *and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States*; that the lands belonging to citizens of the United States residing without the said States shall never be taxed at a higher rate than the lands belonging to residents thereof; that no taxes shall be imposed by the States on lands or property therein belonging to or which may here-

after be purchased by the United States or reserved for its use. * * *" (Italics ours.)

In compliance with the enabling act, Art. XXVI of the Washington state constitution provided as follows:

"COMPACT WITH THE UNITED STATES

"The following ordinance shall be irrevocable without the consent of the United States and the *people of this state*:

"* * *

"Second. That the people inhabiting this state do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries of this state, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, *and said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States* and that the lands belonging to citizens of the United States residing without the limits of this state shall never be taxed at a higher rate than the lands belonging to residents thereof; and that no taxes shall be imposed by the state on lands or property therein, belonging to or which may be hereafter purchased by the United States or reserved for use: * * *" (Italics ours.)

In 1953, Congress enacted Public Law 280 (67 Stat. 588, 590), consenting to the assumption of jurisdiction over Indians by the states. The pertinent sections of Public Law 280, *supra*, provide:

"Sec. 6. Notwithstanding the provisions of any Enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act: *Provided*, That the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes as the case may be.

"Sec. 7. The consent of the United States is hereby given to any other State not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both, as provided for in this Act, to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof."

Supplementing Congressional enactment of Public Law 280, *supra*, our legislature enacted chapter 240, Laws of 1957, p. 941. The following portion of chapter 240 is significant:

"SECTION 1. The state of Washington hereby obligates and binds itself to assume, as hereinafter provided, criminal and civil jurisdiction over Indians and Indian territory, reservation, country, and lands within this state in accordance with the consent of the United States given by the act of August 15, 1953 (Public Law 280, 83rd Congress, 1st Session)."

Inter alia, chapter 240, *supra*, provides that the state of Washington shall not assume jurisdiction over an Indian tribe in this state until such tribe expresses a desire for its people to be subject to the jurisdiction of the state of Washington. The procedure is specified. A tribe may petition the governor of the state. The governor then may issue a proclamation to the effect that the state of Washington assumes jurisdiction over the petitioning tribe.

Subsequent to the enactment of chapter 240, *supra*, the Tulalip Indian Corporation petitioned the governor to place its tribe under the jurisdiction of the state of Washington. The governor proclaimed the assumption of jurisdiction shortly thereafter, as provided in chapter 240, *supra*.

Defendant asserts that chapter 240, *supra*, violates Art. XXVI of the Washington state constitution; consequently, that it is unconstitutional. The basic question which defendant's contention raises in the instant case is whether "the consent of the people" of this state (in terms of Art. XXVI, *supra*) may be effectuated or accomplished by action of the legislature; or whether it must be accomplished, if at all, through action by the people of the state of Washington in voting to amend the state constitution.

The same question was before the court in *Boeing Aircraft Co. v. Reconstruction Finance Corp.* (1946), 25 Wn. (2d) 652, 171 P. (2d) 838, 168 A. L. R. 539. Therein, the court was concerned with another portion of Art. XXVI, *supra*; namely, the

provision that, without the consent of the United States and the people of this state,

> "'* * * no taxes shall be imposed by the state on lands or property therein belonging to or which may be hereafter purchased by the United States or reserved for use: * * *'"

In the *Boeing* case, *supra*, the court clearly held that the legislature could effect or accomplish consent of the people of this state, within the meaning of Art. XXVI, *supra*. The reasoning of the court, in part, was that

> "The enabling act was approved February 22, 1889. Our constitution was framed August 22, 1889, and ratified by the people at an election held October 1, 1889. On November 11, 1889, President Harrison, in accordance with the provisions of the enabling act, proclaimed the admission of the state of Washington into the Union. At the times just mentioned, there was no method, aside from amending the constitution, of submitting a question to the people of this state. Neither the initiative nor the referendum was known or even thought of at that time. It is an inescapable conclusion that the framers of the constitution and the Congress of the United States intended that any agreement allowing Federal property to be taxed, would be arrived at by the passage of laws by the Congress of the United States and *the legislature of the state of Washington.* It is clearly apparent that the makers of our constitution had this in mind that *the people would speak through the mouth of the legislature in agreeing that Federal property might be taxed.*" (Italics ours.)

[1] We believe that this reasoning is still sound. It will be noted that the framers of our constitution, in enacting Art. XXVI, *supra*, adopted the identical words found in the enabling act. Apparently, this was done to conform with the requirements imposed by Congress for admission of Washington state into the Union. Congress did not require that this compact clause be irrevocable, absent a Washington state constitutional amendment. Rather, Congress insisted on bilateral action by the people of the United States (speaking through Congress) and the people of the state of Washington (speaking through the legislature).

[2] In the present case it is factually significant that Congress has consented to the assumption of jurisdiction over the members of Indian tribes by the states; *provided*, of course, that proper state action is taken consenting thereto. Our state legislature, by enacting chapter 240, *supra*, has spoken for the people of the state, supplementing the action by Congress. Pursuant to the act, the Tulalip Indian tribe petitioned the governor for placement under state jurisdiction. The governor has proclaimed this jurisdiction. It is our conclusion that the state of Washington now has jurisdiction over the Tulalip Indian tribe and, more specifically, over the defendant in this case. Accordingly, it follows that the judgment of the trial court should be reversed. It is so ordered.

MALLERY, DONWORTH, ROSELLINI, OTT, FOSTER, and HUNTER, JJ., concur.

WEAVER, C. J., and HILL, J. concur in the result.

May 4, 1959. Petition for rehearing denied.

APPENDIX B

37.12.010 **Assumption of criminal and civil jurisdiction by the state.** The state of Washington hereby obligates and binds itself to assume criminal and civil jurisdiction over Indians and Indian territory, reservations, country, and lands within this state in accordance with the consent of the United States given by the act of August 15, 1953 (Public Law 280, 83rd Congress, 1st Session), but such assumption of jurisdiction shall not apply to Indians when on their tribal lands or allotted lands within an established Indian reservation and held in trust by the United States or subject to a restriction against alienation imposed by the United States, unless the provisions of RCW 37.12.021 have been invoked, except for the following:

(1) Compulsory school attendance;

(2) Public assistance;

(3) Domestic relations;

(4) Mental illness;

(5) Juvenile delinquency;

(6) Adoption proceedings;

(7) Dependent children; and

(8) Operation of motor vehicles upon the public streets, alleys, roads and highways: *Provided further*, That Indian tribes that petitioned for, were granted and became subject to state jurisdiction pursuant to this chapter on or before March 13, 1963 shall remain subject to state civil and criminal jurisdiction as if chapter 36, Laws of 1963 had not been enacted.

37.12.021 ——Resolution of request—Proclamation by governor, 1963 act. Whenever the governor of this state shall receive from the majority of any tribe or the tribal council or other governing body, duly recognized by the Bureau of Indian Affairs, of any Indian tribe, community, band or group in this state a resolution expressing its desire that its people and lands be subject to the criminal or civil jurisdiction of the state of Washington to the full extent authorized by federal law, he shall issue within sixty days a proclamation to the effect that such jurisdiction shall apply to all Indians and all Indian territory, reservations, country, and lands of the Indian body involved to the same extent that this state exercises civil and criminal jurisdiction or both elsewhere within the state: *Provided*, That jurisdiction assumed pursuant to this section shall nevertheless be subject to the limitations set forth in RCW 37.12.060.